EIGHTY-EIGHTH SESSION

In re Roudakov

Judgment 1895

The Administrative Tribunal,

Considering the complaint filed by Mr Vladimir Ivanovitch Roudakov against the World Health Organization (WHO) on 23 September 1998, the WHO's reply of 15 February 1999, the complainant's rejoinder of 8 April and the Organization's surrejoinder of 9 July 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Material facts relevant to this case are set out in Judgment 1883 on Mr Roudakov's motion for an interlocutory order granting interim relief. This motion was dismissed by the Tribunal.

B. The complainant states that during his appointment at the WHO as head of the Russian language translation subunit he was at all times a regular staff member and not on "true secondment" so there should have been a "valid and lawful reason" for the non-renewal of his contract. He has four pleas.

First, he challenges the lawfulness of the WHO's decision not to renew his contract. He contends that his status as a "seconded" staff member has never been defined in a formal tripartite agreement signed by him, the Ministry of Health of his country and the Organization as the WHO itself stated was required by Judgment 1249 (*in re* Reznikov). A staff member cannot be deemed to be seconded simply because he was hired on the basis of an agreement between an organisation and the government of his country. He was not privy to all the terms and conditions of that agreement.

On 20 April 1993, pursuant to Judgment 1249, the Organization sent the complainant a memorandum requesting him to return it, indicating formally whether or not he wished to be considered as being on secondment. On returning it duly signed the complainant said that he "wished" to be considered as being on secondment; he also noted that he "did not understand what ... the new secondment rules" were. In fact they were never supplied to him. Nor did his acknowledgement of a similar memorandum in 1995 create a valid and legally binding agreement between himself, the Organization and the Government.

Moreover, the Director of the Division of Personnel acknowledged in a communication of 4 August 1997 that the sole reason for the non-extension of his contract was the request from the Ministry of Health of the Russian Federation that his contract should not be extended beyond the end of its term on 31 December 1997. The complainant refers to Article 37 of the WHO Constitution which states that its staff must not "seek or receive instructions from any government or from any authority external to the Organization" and to Staff Regulations 1.10 and 1.11 which require staff members to take an oath that they will not accept such instructions.

Secondly, the complainant pleads that errors of fact and law made the non-renewal of his contract "irregular and void". Despite repeated requests, the Administration refused to provide him with the grounds or the evidence it relied upon in asserting that he was formerly a member of the civil service of the Russian Federation, thus making his appointment at the WHO a secondment.

Thirdly, the impugned decision is void because the Organization failed to give him a valid and lawful reason for it. The WHO has not asserted that the complainant's service was unsatisfactory or that his post was abolished, which are the two main reasons for non-renewal of a contract. He alleges that his contract was not renewed because the Russian Federation wished to replace him with a "favoured" official. He adds that he had a reasonable expectation of renewal and accuses the WHO of bad faith and lack of consideration for his rights.

Fourthly, he submits that the actions of certain members of the WHO Administration were the result of "malice

and prejudice". They failed to answer his inquiries about formalising his alleged secondment; they took instructions from the Russian Federation; they illegally made him unemployed; and they refused to grant him available short-term translation contracts after his separation from service. These actions have caused him grave injury which in his view justifies substantial moral damages and disciplinary action against the officials concerned.

The complainant requests the Tribunal to order the WHO to produce specific documents in their complete form "for inspection and review", in particular the full text of the letter from the Russian Federation which purported to instruct the WHO not to renew his appointment, but which has been provided only in a summarised version.

He seeks: (1) the quashing of the decision of the Director-General dated 26 June 1998; (2) the setting aside of the decision dated 1 July 1997 not to renew his contract; (3) the setting aside of the notice of non-renewal of contract dated 19 September 1997; (4) the official removal of those documents from his personal files; (5) "full and total reintegration" at the WHO retroactively from 31 December 1997 and an extension of contract for five years, from 1 January 1998 or from the effective date of his reinstatement, whichever date is later; (6) full restoration and payment of salary, benefits, adjustments and emoluments which would have been due to him had his contract been renewed with effect from 1 January 1998 to the date of his reinstatement at the WHO; (7) moral damages of at least 250,000 United States dollars for the WHO's "intentional and unjustifiable failure to abide by the holding of *in re* Reznikov in [his] case, and the moral injury suffered by [him] as a result of the WHO's irregular and illegal actions"; (8) interest at the rate of ten per cent per annum from 1 January 1998 to the date of "full and complete performance of any awards made by the Director-General pursuant to any judgment of the Tribunal hereunder"; (9) 15,000 Swiss francs in costs and legal expenses; (10) disciplinary measures against the WHO officials responsible for his separation from service; and (11) "such other relief as the Tribunal deems necessary, just and equitable".

C. The Organization replies that the complainant was a staff member on secondment while at the WHO and rejects the complainant's central plea that there was no formal tripartite agreement.

According to the Organization, in order to be valid a tripartite agreement need not be a single document bearing the signatures of all three parties. There was an "express" agreement evidenced by an exchange of correspondence between the three parties in 1993 and 1995 where: (1) the Organization sought and obtained the Ministry's express agreement on the extension of the complainant's secondment and its conditions; (2) the Organization conveyed the Ministry's consent to the complainant and its own wish to extend his appointment and sought his express concurrence; (3) the complainant unequivocally confirmed his agreement to the secondment and its conditions.

The complainant was given a clear choice between whether he wished to be considered on secondment or not and he freely chose the former option. Even though he queried the "modalities", and specifically the duration of the possible extensions of appointment, this did not alter in any way the essence of his agreement.

Further, the Organization contends that it did formalise the agreement by seeking the express consent of the parties in 1993 and 1995, and by revising Staff Rule 440 to embody the principle that a secondment and any extension required the agreement of the three parties concerned.

It also rejects the complainant's suggestion that he was not aware of the implications when he consented to the secondment agreements. In a memorandum dated 28 July 1995 he wrote: "taking into account that I am on secondment from my Government ...".

The WHO maintains that it secured an express undertaking from the Russian Federation in 1993 and again in 1995 that the complainant would be able to revert to his previous employment and retain all his rights and entitlements. The fact that the complainant was possibly dissatisfied with the employment offer made by his Government does not alter the fact that there was a secondment agreement. That one party might have subsequent difficulty in implementing an undertaking does not render a contract void. *In re* Reznikov is not applicable in this case. The Organization maintains that it acted correctly in taking into account the decision of the Russian Federation.

The complainant's claim that he was never a member of the civil service of the Russian Federation is contradicted by the fact that he had a diplomatic passport that is issued by the Russian Federation to civil servants of a higher rank.

The Organization states that its decision was free from any flaw, and "from any personal prejudice". It also rejects the complainant's claim for disciplinary measures against officials of the Organization as being irreceivable as it is

a new claim and without merit.

D. In his rejoinder the complainant presses his pleas. The wording of the WHO's memorandum of 1993 gave him the choice of being considered on secondment under new rules. As is clear from the remark he wrote on signing the agreement, his assent was conditional.

There was an "unequal bargaining position" between him and the Organization because he was working without an extension of contract when he signed the 1995 agreement and he would have "signed anything the WHO put in front of him to maintain his position within the Organization".

Staff Rule 440.4 was promulgated after he signed the 1993 memorandum, and the WHO had a duty to bring it to his attention - which it did not.

The complainant states that he was never an official of the Russian Ministry of Health and that all Russian citizens who worked abroad with international organisations were given diplomatic passports, not just those who were seconded from the Russian civil service. He had worked at the Russian Academy of Sciences, which is independent from the Russian Ministry of Health. The Academy never guaranteed the restoration of his former position, which the principle of secondment requires, and in 1997 it advised him that he would not be able to resume it.

E. In its surrejoinder the Organization denies that the complainant was simply advised of the agreement between the WHO and the Russian Ministry; he gave his concurrence in 1993 and again in 1995 by signing the following clause: "I have been informed and accept the conditions governing extension of my contract referred to above". This concluded the agreement.

In a statement filed with the headquarters Board of Appeal in 1997, the complainant himself declared that the Russian Ministry of Health and the Academy of Sciences were, at that time, two separate institutions; this was not the case at the time the Ministry of Health issued its undertaking that he would have the right to revert to his former employment. The Russian Ministry of Health has since offered the complainant the position of Senior Lecturer at the Russian Medical Academy of Postgraduate Education of the Ministry, and is awaiting his return.

The Organization observes that, in his rejoinder, the complainant argues again that he was never a member of the Russian civil service. Yet he never raised this issue while serving at the WHO or in his submissions to the Board of Appeal. The Organization maintains that this late allegation cannot be sustained because, although he may not have been in possession of a diplomatic passport at the time of his separation from service, he did hold one before.

CONSIDERATIONS

1. The complainant challenges the decision of his employer, the World Health Organization (WHO), not to extend his appointment beyond 31 December 1997, the date of the expiry of his fixed-term contract. The only substantive issue between the parties is whether or not the complainant was on secondment from his national government at the time of the expiry of his fixed-term contract and, if so, whether the Organization could properly refuse to renew his contract.

2. At the time of his initial appointment on 1 July 1989, there was no clear, documented agreement between the Organization, the Government of the then USSR and the complainant establishing that the latter was indeed on secondment. In April 1993, just prior to the expiry of the complainant's fixed-term appointment, the Organization wrote to ask him if he wished to be considered as being on secondment. The complainant replied by signing a copy of the Organization's letter indicating that he did wish to be so considered; he also asked a question about the effects of being on secondment which, at least as far as the documents show, does not appear to have been answered. The Organization then sought and obtained the concurrence of the Ministry of Health of the Russian Federation to the secondment of the complainant for a further period of two years. When the concurrence of the Ministry had been obtained the Organization sought the complainant's agreement to the extension of his appointment on secondment. On 15 September 1993 the complainant confirmed unequivocally his acceptance of the extension of his contract as an employee on secondment. A further extension to 31 December 1997 was later granted with the written concurrence of the complainant's national government and the complainant.

3. In June 1997 the Ministry of Health of the Russian Federation informed the Organization of its decision not to extend the complainant's secondment beyond the date on which it was due to expire, namely 31 December 1997. When the Organization confirmed that it would not renew the complainant's appointment beyond its expiry date,

the complainant appealed to the headquarters Board of Appeal which recommended that his appeal be allowed on the basis that there was no "written formal tripartite agreement" covering the complainant's secondment. The Board seems to have been of the view that such agreement was required by the Tribunal's Judgment 1249 (*in re* Reznikov). By letter dated 26 June 1998, the Director-General refused to accept the Board's recommendation. He asserted that the complainant was on secondment from the Government of the Russian Federation and that the latter had not agreed to an extension of the complainant's appointment beyond 31 December 1997. The Russian Government had, however, confirmed that his rights and entitlements as an employee of that Government would be maintained. The Director-General accordingly confirmed the decision not to extend the complainant's employment. That is the impugned decision.

4. Many of the complainant's arguments do not merit prolonged consideration; there is no evidence to show that his consent to secondment was not voluntary and his civil service in Russia cannot be seriously contested. The complainant's only substantive argument is based upon his reading of the Tribunal's decision *in re* Reznikov which, he argues, establishes that a formal single document signed by all three parties is required to establish a secondment. He also argues that his signature to various memoranda in which he appears to have accepted secondment indicates only that he wished to be considered for secondment and not that he agreed to it. He also says that a true secondment requires that the seconded staff member be entitled to return to his former position with his national government when the secondment comes to an end.

5. The arguments are untenable. The requirement that a secondment be properly documented and consented to by all parties, which flows from the *in re* Reznikov judgment, does not require that all three parties put their signature to a single piece of paper. What happened in the present case was quite enough to establish such an agreement. The correspondence described above (at 2) shows that the agreement is "formal" in the sense that it is fully documented; it is also "tripartite" in the sense that there is a clear meeting of the minds of the three parties concerned. Nothing more is required. The Board of Appeal's reading of the *in re* Reznikov decision as requiring a "written formal tripartite agreement" finds no warrant in the actual wording of that decision. Secondly, the documents simply do not bear the construction which the complainant seeks to put upon them. While his signature on the memorandum of 20 April 1993 from the Administration may be seen as equivocal (it is not necessary to decide on that point), his subsequent endorsements of the documents submitted to him cannot be read as anything but a clear acceptance of his status as a seconded employee.

6. Finally, the evidence is to the effect that the Government of the Russian Federation has undertaken to respect the complainant's rights as an employee. This is all that the Organization can be required to secure for him. It is not, as the complainant seems to think, obliged to guarantee that he will be entitled to return to the identical post that he occupied at the time when he left.

7. What is required of the seconding government is that it undertake to provide the seconded employee upon his return with all the employment rights he would have had if he had continued in the employment of the government. There is no indication whatever that the Government of the Russian Federation will not fulfil its obligation in this regard.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

Michel Gentot
Mella Carroll
James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 7 July 2000.